Ghazali bin Mat Ghani v Public Prosecutor

COURT OF APPEAL (KUALA LUMPUR) — CRIMINAL APPEAL NO W-05-37 OF 1994
SHAIK DAUD, ABU MANSOR AND HAIDAR JJCA
24 FEBRUARY 1998

Criminal Procedure *— Jury — Summing-up by judge — Whether judge had failed to fully explain distinction between ss 299 and 300 of the Penal Code (FMS Cap 45) — Whether there was anything wanting in the trial judge's direction to jury — Whether there was miscarriage of justice*

The appellant was charged with murder of a police officer before a judicial commissioner sitting with a jury. At the conclusion of the trial, he was found guilty by the jury's unanimous verdict and was convicted accordingly and sentenced to death.

The principal ground of appeal was that the judicial commissioner had failed to direct the jury adequately or at all on the differences between ss 299 and 300 of the Penal Code (FMS Cap 45). The appellant's counsel submitted that the judicial commissioner made no attempt to explain to the jurors further that culpable homicide may not amount to murder. He argued that the failure to render such an explanation had thus prejudiced the appellant, in that it led the jury to believe that unless the accused could rely on any of the exceptions in s 300, he could not otherwise be found guilty of culpable homicide not amounting to murder.

Held, dismissing the appeal and confirming the sentence:

(1) There was no merit in the appellant's main ground of appeal that the learned judicial commissioner did not fully explain the distinction between ss 299 and 300 of the Penal Code (FMS Cap 45) and the learned judicial commissioner's failure to explain that the accused could be guilty of a lesser offence of homicide not amounting to murder. There was nothing wanting in the judicial commissioner's direction to the jury. Further, there were no facts favourable to the accused that should weigh on the judicial commissioner to direct the jury that the accused could be guilty of homicide not amounting to murder or any lesser offence (see pp 683I and 684A,C).

(2) It was correct from the facts that the accused inflicted the injury to the deceased's heart causing instantaneous death and the accused's defence that he did not shoot the deceased but it was somebody else who did, justified the judicial commissioner leaving it to the jury to find the intention of the accused and such intention was to commit murder or nothing else. The jury gave an answer after having been directed fully and clearly by the judicial commissioner that the accused did shoot with the required intention to kill and they unanimously held he committed murder. The direction to the jury was correct and there was no miscarriage

of justice. Further, assuming the deceased had pointed his pistol at the accused, it could not at any time be interpreted as provocation as justifying the accused to use the illegal M16 he had to kill him (see pp 684D–E, H–I and 685A).

[Bahasa Malaysia summary

Perayu telah dipertuduhkan dengan kesalahan membunuh di hadapan seorang pesuruhjaya kehakiman yang bersidang dengan juri. Di akhir perbicaraan, dia didapati bersalah oleh keputusan sebulat suara juri dan disabit sewajarnya dan dijatuhkan hukuman mati.

Alasan rayuan yang utama adalah bahawa pesuruhjaya kehakiman telah gagal mengarahkan juri dengan secukupnya atau sama sekali atas perbezaan-perbezaan di antara ss 299 dan 300 Kanun Keseksaan (NMB Bab 45). Peguam perayu menghujahkan bahawa pesuruhjaya kehakiman tidak cuba menjelaskan kepada ahli-ahli juri secara lebih lanjut bahawa homisid salah mungkin tak terjumlah membunuh. Beliau berhujah bahawa kegagalan untuk memberi penjelasan sedemikian telah menjejaskan perayu, dalam ertikata bahawa ia menyebabkan juri mempercayai bahawa melainkan tertuduh boleh bergantung pada mana-mana kekecualian dalam s 300, dia boleh didapati bersalah bersalah atas homisid salah tak terjumlah membunuh.

Diputuskan, menolak rayuan dan mengesahkan hukuman:

(1) Tiada merit dalam alasan rayuan utama perayu bahawa pesuruhjaya kehakiman yang arif tidak menjelaskan dengan sepenuhnya perbezaan di antara ss 299 dan 300 Kanun Keseksaan (NMB Bab 45) dan kegagalan pesuruhjaya kehakiman yang arif untuk menjelaskan bahawa tertuduh boleh didapati bersalah atas kesalahan yang lebih ringan iaitu homisid tak terjumlah membunuh. Tiada apa-apa yang kekurangan dalam arahan pesuruhjaya kehakiman kepada juri. Selanjutnya, tiada fakta yang memihak kepada tertuduh yang harus diambil kira oleh pesuruhjaya kehakiman untuk mengarahkan juri bahawa tertuduh boleh didapati bersalah atas homisid tak terjumlah membunuh atau mana-mana kesalahan yang lebih ringan (lihat ms 683I dan 684A, C).

(2) Adalah betul daripada fakta-fakta bahawa tertuduh telah menyebabkan kecederaan kepada jantung si mati mengakibatkan kematian serta merta dan pembelaan tertuduh bahawa dia tidak menembak si mati tetapi orang lain yang berbuat demikian, memberi justifikasi kepada pesuruhjaya kehakiman membiarkannya kepada juri untuk mendapati tujuan tertuduh dan tujuan sedemikian adalah untuk membunuh dan bukan tujuan lain. Juri telah memberi jawapan selepas diarahkan sepenuhnya dan dengan jelas oleh pesuruhjaya kehakiman bahawa tertuduh memang telah menembak dengan hasrat untuk membunuh dan mereka memutuskan secara sebulat suara dia

telah melakukan pembunuhan. Arahan kepada juri adalah betul dan tidak terdapat salah laksana keadilan. Selanjutnya, dengan beranggapan si mati telah mengacu pistolnya kepada tertuduh, ia tidak boleh pada bila-bila masa ditafsirkan sebagai bangkitan marah bagi memberi justifikasi kepada tertuduh untuk menggunakan M16 haram yang dimilikinya itu untuk membunuh si mati (lihat ms 684D–E, H–I dan 685A).]

Notes

For a case on summing-up by judge, see 5 *Mallal's Digest* (4th Ed, 1994 Reissue) para 1644.

Cases referred to

Chung Kum Moey v PP [1967] 1 MLJ 205 (refd)
Tham Kai Yau & Ors v PP [1977] 1 MLJ 174 (refd)

Legislation referred to

Penal Code (FMS Cap 45) ss 299, 300, 302

Appeal from: Criminal Trial No 45–1 of 1994 (High Court, Kuala Lumpur)

Collin Sequerah (*Zain & Co*) for the appellant.
Kamaruzaman bin Abdul Jalil (Deputy Public Prosecutor) for the respondent.

Cur Adv Vult

Abu Mansor JCA (delivering judgment of the court): The appellant was charged before the learned judicial commissioner (as he then was) Hashim Yusoff JC sitting with a jury on 19 September 1994 as follows:

> Bahawa kamu, pada 26 Disember 1992 jam lebih kurang 12.05 tengah malam, di Jalan Jalak, Taman Sri Bahtera, Cheras di dalam Wilayah Persekutuan Kuala Lumpur, telah melakukan kesalahan bunuh dengan menyebabkan kematian ke atas Konst 114302 Rahim bin Manan, dan dengan itu kamu telah melakukan satu kesalahan yang boleh dihukum di bawah s 302 Kanun Keseksaan (NMB Bab 45).

At the conclusion of the trial on 30 September 1994, he was found guilty by the jury's unanimous verdict and he was convicted accordingly and sentenced to death.

The first and principal ground of the appellant was that the learned judicial commissioner failed to direct the jury adequately or at all on the differences between ss 299 and 300 of the Penal Code (FMS Cap 45). The learned judicial commissioner at pp 226 and 227 of the appeal record in his summing up read out verbatim the cases falling under s 300.

The appellant's counsel further submitted that at p 228 of the appeal record, the learned judicial commissioner then gave two examples that would amount to an act of murder within the definition of s 300. The learned judicial commissioner then went on at pp 228 and 229 of the appeal record to explain the definition of culpable homicide not amounting to murder by listing out verbatim the exceptions in s 300. The learned judicial commissioner made no attempt to explain to the jurors further that culpable homicide may not amount to murder:

(a) where the evidence is sufficient to constitute murder, but one or more of the exceptions to s 300 apply; and

(b) where the necessary degree of mens rea specified in s 299 is present, but not the special degrees of mens rea referred to in s 300 of the Penal Code (FMS Cap 45).

The failure by the learned judicial commissioner, the appellant's counsel further submitted, to so render such an explanation had thus prejudiced the appellant, in that it led the jury to believe that unless the accused could rely on any of the exceptions in s 300, he could not otherwise be found guilty of culpable homicide not amounting to murder.

Learned appellant's counsel cited the case of *Tham Kai Yau & Ors v PP* [1977] 1 MLJ 174 where the facts of the case are very different from our present appeal. At p 176 of this cited case, Raja Azlan Shah FJ (as he then was) said and I quote, with respect:

> A more difficult question that called for decision in this case was the offence of which the appellants should have been convicted. That was the other important ground of appeal, namely, that the learned trial judge failed to direct the jury properly or sufficiently or at all that where there is more than one inference which can reasonably be drawn from a set of facts, the inference most favourable to the accused should be adopted. In amplication of this ground of appeal we feel that it is the proper practice in cases of personal violence resulting in death for the judge to direct the jury on the right issue, in such a case as this, to arrive at a conclusion as to the degree of mens rea in the minds of the appellants. It cannot be disputed that intention is a matter of inference.

Speaking of this cited case, what were the set of facts spoken there? What is clear in the facts of this cited case was the background of the estranged relationship between the deceased and the appellant. It is alleged by the prosecution that the appellant and one other made an attack with choppers and saw on the deceased. On that fatal day of the incident, it was not denied that there was a fight which resulted in the death of the deceased. The first and second appellants had to go to the General Hospital for treatment, the third appellant had a head injury and injury to an arm. In the fourth appellant's house the police recovered the choppers used.

On the medical evidence, Raja Azlan Shah FJ commented thus and I quote (at p 175):

> The pathologist testified that in his opinion the probable cause of death was multiple injuries leading to shock and haemorrhage. On the question whether

A the appellants intended to cause such bodily injuries as they knew to be likely to cause death or such as is sufficient in the ordinary course of nature to cause death, the medical witness should have been asked to give his opinion on the nature of the injuries and its likely and natural effects, but in this respect his evidence is silent.

B From the sets of facts in the cited case there was therefore the evidence of sudden fight in which the jury ought to be directed for a possible verdict. Then there is the lacuna or want in the evidence of the pathologist to enable the jury to establish the appellants' intention.

If we compare the facts of the present appeal, with due respect to appellant's counsel, there is no similarity at all to the set of facts in the C cited case.

Learned counsel for the appellant also cited the case of *Chung Kum Moey v PP* [1967] 1 MLJ 205, where the facts of the case concerned the fatal shooting of a shopkeeper in the course of a robbery and I respectfully quote the headnote of the case giving the facts and the judge's direction at D the trial as follows (at p 205):

> The appellant with two other men, entered a shop in Tanjong Katong Road, Singapore. He produced a revolver and told Chia Mui Song, its owner, to come out from behind the counter. Chia Mui Song did so and the appellant asked him for his keys and tried to search him. Chia Mui Song brushed his hands away and the appellant then fired a shot, in the direction E of Chia Mui Song which hit him in the arm. After a struggle, Chia Mui Song tried to get hold of the telephone which was on the counter behind which he had been sitting. The appellant fired again and Chia Mui Song died. Three bullets had struck his body and two on his right arm; one or both of these which went through his arm might have entered his body, but there was no evidence to that effect. The appellant was tried before a jury F and the trial judge in summing up, having explained the first, third and fourth limbs of s 300 of the Penal Code, said: 'If you take the same view as myself, you will decide that the injuries to the chest and abdomen were not intentionally inflicted by the accused ... the irresistible inference is that he had the knowledge that the act of shooting at the deceased's forearm was so immediately dangerous that it must in all probability cause death or bodily G injury likely to cause death .... It seems to me, therefore, that the prosecution has established beyond reasonable doubt one of the states of mind required for the offence of murder ... . Your main task is, therefore, to decide whether you fully accept the evidence ... that it was the accused who fired the bullets which penetrated the deceased's chest and abdomen'; and just before the end of his summing up the learned trial judge said: 'If you are H fully satisfied on this point, that is, satisfied beyond reasonable doubt, you will find the accused guilty of murder.'. The appellant was convicted of murder and his conviction was upheld by the Federal Court (Barakbah CJ (Malaya), Wylie CJ (Borneo) and Tan Ah Tah J) (22 February 1965). By special leave in forma pauperis in an appeal to the Privy Council, [the Privy Council allowed the appeal.]

I This cited case can be distinguished from our present appeal because Viscount Dilhorne in delivering the judgment of the Privy Council said at p 208:

On the simple facts of this case, it might well be said that a reasonable jury properly directed would inevitably and without doubt have reached the conclusion that the person who fired the shots was guilty of murder. Their Lordships cannot, however, disregard the fact that the learned judge who heard the evidence formed the view that the accused's intention was only to shoot the deceased in the forearm. They are unable therefore to exclude the possibility that a reasonable jury properly directed would have reached the same conclusion, and, if it had, the possibility that it would not have concluded that the accused knew that the shots at the deceased's forearm were so imminently dangerous that they must in all probability cause death or such bodily injury as was likely to cause death or that the injury intended was sufficient in the ordinary course of nature to cause death. Their Lordships are therefore unable to apply the proviso.

On any view of the evidence, the appellant was guilty of culpable homicide.

At p 226 of the appeal record in para 12, the learned judicial commissioner said as follows and we set out that direction in paras 12–14:

12 Di sisi undang-undang bukan semua kes yang menyebabkan kematian seseorang manusia disifatkan kesalahan membunuh. Misalnya, kematian itu boleh berlaku dengan tidak sengaja atau wajar dilakukan (justifiable homicide) dan oleh yang demikian, tiada apa-apa kesalahan dilakukan. Ada juga kematian yang jatuh di bawah definisi menyebabkan kematian dengan salah seperti yang ditakrifkan di bawah s 299 Kanun Keseksaan dan di bawah kekecualian kepada s 300 Kanun Keseksaan — di mana kesalahan tersebut dikenali sebagai 'culpable homicide not amounting to murder'.

13 Seksyen 302 Kanun Keseksaan adalah seksyen bagi kesalahan membunuh orang. Apakah yang menjadi pembunuhan di sisi undang-undang? Pembunuhan telah ditakrifkan dalam seksyen tertentu dalam Kanun Keseksaan. Biarlah saya jelaskan bahagian undang-undang tersebut dengan menyatakan bahawa mematikan seseorang dengan salah adalah suatu pembunuhan jika:

(1) Kematian itu dilakukan dengan niat hendak menyebabkan kematian; atau

(2) Sekiranya dilakukan dengan niat hendak menyebabkan sesuatu bencana atau kecederaan tubuh yang pesalah itu mengetahui mungkin menyebabkan kematian orang yang dikenakan bencana itu; atau

(3) Sekiranya dilakukan dengan niat hendak menyebabkan bencana atau kecederaan tubuh kepada seseorang dan bencana kecederaan tubuh yang dimaksudkan hendak dikenakan itu adalah cukup pada lazimnya bagi menyebabkan kematian; atau

(4) Sekiranya pesalah itu mengetahui bahawa perbuatan itu adalah sebegitu sekali berbahaya hingga mungkin sekali menyebabkan kematian, dan dia melakukan perbuatan itu dengan tiada apa-apa sebab bagi mendatangkan bahaya menyebabkan kematian atau bencana sebagaimana tersebut.

Misalnya:

(a) Jika A memancung leher B dengan tujuan menyebabkan kematian dan B mati akibatnya, A telah melakukan pembunuhan;

(b) A dengan sengaja melukakan B dengan pisau atau benda tajam dan luka itu pada lazimnya mencukupi untuk menyebabkan kematian dan B mati akibatnya. Di sini A juga telah melakukan pembunuhan walaupun dia mungkin tidak berniat untuk menyebabkan kematian B.

14 Itulah dia 'ingredient' atau unsur-unsur yang diperlukan untuk melakukan pembunuhan di sisi undang-undang. Sekarang biar saya terangkan pula definisi homisid salah tak terjumlah membunuh (culpable homicide not amounting to murder).

Perlu juga saya nyatakan, di sisi undang-undang, dalam beberapa keadaan tertentu, di mana menyebabkan kematian seseorang tidak menjadi suatu pembunuhan jika kematian itu dilakukan kerana:

(1) kebangkitan marah besar dan mengejut kepada pesalah (grave and sudden provocation); atau

(2) melebihi kuasa mempertahankan diri; atau

(3) melebihi kuasa yang diberikan kepada kakitangan kerajaan dalam menjalankan keadilan awam; atau

(4) semasa pergaduhan mengejut atau perasaan panas hati (heat of passion); atau

(5) jika si mati yang berumur lebih dari 18 tahun mati atau mengambil risiko mati dengan kerelaan dirinya sendiri.

It is clear that the learned judicial commissioner's direction at that stage was a general statement of the law on what amounts to culpable homicide and what constitutes murder. He had not come to discuss the evidence on the case and applying the law to the set of facts.

The learned judicial commissioner then went on to direct the jury on the ingredients of murder, referring specifically to the case before the jury. At para 15 at p 229 of the appeal record, the judicial commissioner spoke of the burden of the prosecution to prove their case beyond reasonable doubt:

> Sekarang mari kita lihat kes pendakwaan seperti yang telah dibentangkan di hadapan tuan-tuan dan puan-puan semua. Dalam kes ini, adalah tanggungjawab pihak pendakwaan untuk membuktikan tiga unsur iaitu:
>
> (1) Bahawa Kons 114302 Rahim bin Manan telah mati dan beliau mati disebabkan kecederaan atau kecederaan-kecederaan yang dikenakan keatasnya;
>
> (2) Bahawa tertuduhlah yang mengenakan kecederaan-kecederaan itu dan akibatnya Kons Rahim bin Manan telah mati; dan
>
> (3) Bahawa semasa mengenakan kecederaan atau kecederaan-kecederaan itu tertuduh mempunyai niat hendak menyebabkan kematian atau mempunyai salah satu daripada niat atau pengetahuan yang saya sebutkan tadi sebagai 'ingredient' yang perlu untuk kesalahan membunuh.

Then the learned judicial commissioner went through the prosecution case. The prosecution had to prove the death of the deceased Constable 114302 Rahim bin Manan. It cannot be disputed he had died.

He continued, according to the evidence of Dr Mohd Shah bin Mahmood ('SP24'), from his post mortem, the deceased was shot at least twice which bullets landed on the body of the constable. The injuries were as in the photos P4I, J, L, N, O, P and R.

SP24 continued in his evidence that the fatal shot was the shot which ruptured the deceased's heart which was found as shown and marked as No 6-5-4 on P94. SP24 said that shot could cause the death of the deceased immediately (serta merta). Another fatal injury was described as 10-3-2-1 in P94 but this injury did not cause instant death. According to SP24, the cause of death was the shot to the heart of the deceased.

The learned judicial commissioner posed the question at p 231 of the appeal record, did the accused cause the injuries as described by Dr Mohd Shah to the deceased Constable Rahim bin Manan?

The answer is in the evidence of two witnesses who saw the accused shoot Constable Rahim. The evidence of Constable Mohd Taipor bin Shaharom ('SP19') was that he was together with the deceased and L/Kpl Ghazali ('SP21') while they were conducting a 'spot check' at the place of the incident at Jalan Jalak, Taman Seri Bahtera, Cheras, Kuala Lumpur on 26 December 1992 at about 12.05am. SP19 stood about three to four feet from L/Kpl Ghazali and the deceased.

SP19 continued his evidence clearly and lucidly (jelas) and he stated that he saw L/Kpl Ghazali stop a red car, Ford Laser (P87) and he directed the car to stop at the side of the road. L/Kpl Ghazali was taking the particulars of the four passengers in the car who all came out of the said car.

SP19 then saw L/Kpl Ghazali proceed to his motorcycle followed by one of the four people and also Constable Rahim. When Constable Rahim had taken a file from L/Kpl Ghazali's motorcycle, they then returned to the said car where the three people were on the right side of the said car.

After that, when L/Kpl Ghazali opened the front door on the driver's side and stooped with half his body in the said car to examine the said car, at that time one of the four earlier walked by himself to the rear left door of the said car. That person opened the rear left door and he took out an M16 gun and immediately shot Constable Rahim and after that he shot at L/Kpl Ghazali. The person who shot them went to move (menguis-guis) the body of L/Kpl Ghazali who had fallen on the road and then he went to inspect Constable Rahim.

At this time, the person who shot tried to re-enter his car while holding the M16 gun and at this time, Constable Taipor shot that person with his 0.38 revolver and the shot cut the chin and neck of that person. The person who was shot then fell down and Constable Taipor handcuffed that person, and that person was the accused.

The evidence of SP19 was fully supported by L/Kpl Ghazali (SP21) from the time they commenced the spot check to the time they were shot.

The chemist (SP17) testified that the bullet fragments (P76A) which were extracted from Constable Rahim could not have come from the

A revolver 0.38 Special. The learned judicial commissioner then left it to the jury to make their finding of fact which was that the death of Constable Rahim was as a result of his injuries and the injuries were as a result of him being shot with the M16 rifle and it was the accused who shot him.

The learned judicial commissioner came to the next most important B part of his direction to the jury which was the poser — did the accused have the intention to murder the deceased? We can do no better than to quote paras 23 and 24 of his summing up:

> 23 Adakah tertuduh mempunyai niat membunuh?
>
> Sekiranya tuan-tuan dan puan-puan mendapati tertuduhlah orang yang C menembak dan menyebabkan kecederaan yang membawa maut kepada Kons Rahim perlu pula tuan-tuan dan puan-puan menimbangkan perkara sama ada tertuduh semasa menyebabkan kecederaan kepada si mati itu mempunyai niat hendak menyebabkan kematian atau mempunyai salah satu daripada niat atau pengetahuan yang saya sebutkan tadi sebagai salah satu unsur yang diperlukan untuk D membuktikan berlakunya pembunuhan dalam kes ini.
>
> 24 Niat seseorang itu hanya dapat dilihat daripada tingkah lakunya. Dr Mohd Shah (SP24) dalam keterangannya menyatakan tembakan yang memecahkan jantung si mati boleh menyebabkan kematian serta merta. Juga, kecederaan tembakan yang terdapat pada si mati adalah mencukupi pada kebiasaannya untuk menyebabkan kematian. Begitu E juga keterangan SP7 ASP Wan Hashim, pegawai persenjataan Ibu Pejabat Kontinjen Kuala Lumpur menyatakan effective range M16 ialah 450m iaitu jarak tembakan yang boleh membawa maut. Keterangan SP19 dan SP21 pula mengatakan tertuduh berada di sebelah kiri pintu belakang kereta manakala Kons Rahim berada di sebelah kanan belakang kereta — sudah tentu jarak antara mereka berdua dekat sahaja apabila F Kons Rahim ditembak. Kita juga telah melihat demonstrasi di kereta yang dibuat oleh SP19 tentang cara tembakan itu berlaku. Berdasarkan keterangan-keterangan ini saya berpendapat adalah jelas tembakan daripada senjata yang mempunyai kuasa velocity yang tinggi seperti M16 itu dari jarak yang begitu dekat sudah tentu akan membawa maut kepada mangsanya. Terpulanglah kepada tuan-tuan dan puan-puan G untuk membuat kesimpulan mengenai hal ini. Keterangan juga menunjukkan bahawa tertuduh adalah seorang bekas komando tentera yang sudah tahu selok-belok senjata M16 kerana dia telah mendalami dan lulus kursus komando.

While leaving it to the jury to answer the question, the learned judicial commissioner gave an opinion that it was clear that a shot from a weapon H of a high velocity such as M16 from a close range must result in death to the victim and the accused must have intended such result. The weapon is even more potent in the hands of such a person as the accused who had been trained and had served as a commando.

On this main ground of the appellant's appeal that the learned judicial I commissioner did not fully explain the distinction between ss 300 and 299 and the learned judicial commissioner's failure to explain that the accused could be guilty of a lesser offence of homicide not amounting to murder, we find there is no merit. After having considered the learned judicial

commissioner's direction, we are unable to find anything wanting and if we may say so, with respect, it was impeccable. A

In the case of *Tham Kai Yau & Ors v PP* [1977] 1 MLJ 175 referred to above, Raja Azlan Shah FJ (as he then was) at p 176 referred to the error of the judge's direction in the ground of appeal:

> ... that the learned trial judge failed to direct the jury properly or sufficiently or at all that where there is more than one inference which can reasonably be drawn from a set of facts, the inference most favourable to the accused should be adopted. B

We failed to find any set of facts favourable to the accused that should weigh on the learned judicial commissioner to direct the jury that the accused could be guilty of homicide not amounting to murder or any lesser offence. C

We have considered the submission of learned counsel for the appellant and we find that it is correct from the facts, as adduced by the prosecution in this trial, that the accused inflicted the injury to the deceased's heart causing instantaneous death and the accused's defence that he did not shoot the deceased but it was somebody else who did, justified the learned judicial commissioner leaving it to the jury to find the intention of the accused and such intention was to commit murder or nothing else. We are satisfied the jury gave an answer after having been directed fully and clearly by the learned judicial commissioner that the accused did shoot with the required intention to kill and they unanimously held he committed murder. D E

The next ground of appeal of the appellant was the judicial commissioner's direction at para 33 at p 241 of the appeal record. We quote: F

> Walaupun peguambela berhujah kemungkinan besar Kons Rahim telah keluarkan pistolnya, jika hal ini diterima sekalipun ini tidak mencukupi untuk menimbulkan provokasi yang amat besar dan mengejut. Tambahan lagi, tiada keterangan yang menyatakan pistol revolver Kons Rahim telah diguna untuk menembak pada masa kejadian itu. Dengan itu, terserahlah kepada tuan-tuan dan puan-puan untuk membuat pendapat dan keputusan sewajarnya. G

Learned counsel complained that the learned judicial commissioner should have left it to the jury to find any fact of provocation. He said in the evidence adduced before him that there is no suggestion that Constable Rahim pointed his pistol at anytime before he was shot. H

We were of the view, assuming Constable Rahim had pointed his pistol at the accused, that it cannot at any time be interpreted as provocation as justifying the accused to use the illegal M16 he had to kill him. Learned counsel for the appellant did not proceed to pursue this line of argument further. I

In reply the learned deputy public prosecutor submitted to us that there was no misdirection by the learned judicial commissioner. We agree with his submission on that, on the evidence adduced, there was only one

direction to give to the jury and it was either murder or nothing else and the jury duly arrived at a verdict that it was murder. We ourselves were satisfied that the direction to the jury was correct and there was no miscarriage of justice. We therefore dismiss the appeal and confirm the sentence passed.

Appeal dismissed. Death sentence confirmed.

Reported by David Lai